Thavanathan a/l Balasubramaniam v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — SUPREME COURT CRIMINAL REFERENCE NO 06-1-94
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
21 MARCH 1997

Evidence *— Relevancy — Admissibility of evidence from previous trial — Whether a second appellate court may analyse, comment and take into consideration evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge — Evidence Act 1950 ss 6, 7, 8 & 9*

Evidence *— Appeal — Admissibility of evidence from previous trial — Whether a second appellate court may analyse, comment and take into consideration evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge — Evidence Act 1950 ss 6, 7, 8 & 9*

Criminal Procedure *— Reference to Supreme Court — Application by accused — Question of law — Public interest — Test for determination — Courts of Judicature Act 1964 s 66*

Criminal Law *— Prevention of Corruption Act — s 4(a) — Illegal gratification — Corruptly accepting money as an inducement to acquit and discharge a third party of an offence in a criminal trial — Whether court ought to convict and find accused guilty as charged — Prevention of Corruption Act 1961 ss 4(a), 14 & 18*

The applicant was initially tried on two charges of corruption under ss 3(a)(i) and 4(a)(i) respectively of the Prevention of Corruption Act 1961 ('the PCA'), before the sessions court. According to the facts, the complainant, one Wong Sow Ying ('PW2') was charged in the applicant's court under the Common Gaming Houses Act 1953. Apparently, the applicant told one Ong Leong Chuan, an interpreter of the court ('PW4'), that the case could be discharged if there was an offer of RM15,000. PW4 communicated this to PW2 who then enlisted the assistance of her son's employer ('PW3') to negotiate the payment of the said amount. Owing to a failure in finalizing the negotiation, PW3 reported the matter to the anti-corruption agency. PW4, who was subsequently arrested, agreed to co-operate with the anti-corruption agency. Ultimately, the applicant was arrested.

The sessions judge discharged and acquitted the applicant on both charges without calling for the defence, ruling that no prima facie case had been made out. On appeal by the prosecution, the High Court affirmed the acquittal and discharge regarding the first charge but allowed the appeal on the second charge and ordered the applicant to enter upon his defence in respect thereof ('the first appeal'). The case was thus sent back before the same sessions judge who, after hearing the defence, again acquitted and discharged the applicant of the second charge. Once more, the prosecution appealed to the High Court against the acquittal and discharge. The appellate judge (other than the judge hearing the first appeal) allowed the

appeal by the prosecution, set aside the acquittal and convicted the applicant and sentenced him to three years' imprisonment and a fine of RM5,000 in default 12 months' imprisonment.

The case before the court was by way of a reference under s 66 of the Courts of Judicature Act 1964 ('the CJA'). Counsel for the applicant contended that the appellate judge should not have relied on specific evidence as he had reopened the evidence on which the applicant had been acquitted. The question for determination was whether it was open for a second appellate court to analyse, comment and take into consideration the evidence adduced on a charge which an accused person had been acquitted to support his conviction on a second remaining charge.

On the facts and evidence of the case, counsel for the accused contended, inter alia, that: (i) the appellate judge had misdirected himself by finding that there was corroboration of the evidence of PW2 when there was none; (ii) the appellate judge failed to recognize the significance of the contents of a search list in which it was stated that the money was found on the floor beside the cabinet in the applicant's chambers; and (iii) the appellate judge failed to consider the defence evidence at all.

Held:

(1) Even in cases where there has been a previous trial, it does not mean that it is never permissible to refer to the earlier trial. Facts or evidence in the earlier trial may be admitted in the subsequent trial where such facts or evidence are relevant or necessary to establish some relevant fact, eg in identifying the occasion on which some particular statement or admission was made or that some conduct had taken place.

Therefore, a second appellate court may analyse, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge provided that the evidence on the first charge is properly admissible in the trial of the second charge, and it is so admissible if it satisfies the law of evidence relating to relevancy. In this case, it was right and proper for the appellate judge to refer to the evidence on which the applicant had been acquitted as they were connected to the offence of the second charge (see pp 411E–H and 412C–D); *Sambasivam v PP, Federation of Malaya* [1950] MLJ 145 followed.

(2) Questions of law which may be referred to court under s 66 of the CJA should not be questions of personal interest only to the applicant or the public prosecutor, but should be questions that are of public interest and the High Court should exercise their discretion under s 66 sparingly and that references are not used as an indirect way of appealing against matters that under the law

A have been finally determined by the High Court. In the particular circumstances of the instant case, it was predominant that if there was reasonable suspicion of a wrong conviction of the offence, opportunity ought, in the public interest, be given to have it reconsidered and, if appropriate, be corrected (see pp 414G–H and 415H–I); *Tan Yin Yen v PP* [1973] 2 MLJ 143 followed.

B (3) To be capable in law of constituting corroboration, the evidence must: (i) in itself be admissible; (ii) come from a source independent of the evidence requiring to be corroborated; and (iii) be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but

C also that it was committed by the accused. In the instant case, PW4's evidence was corroborated by the evidence of PW2 and PW3 (see p 419A–C).

(4) There was no discrepancy between the evidence of the witnesses and the contents of the search list produced. The cumulative

D testimonies of PW4, PW5 and PW6 showed that the accused was handling the money and dropped it to the floor between the table and the steel cabinet when PW5 and PW6 rushed into the chambers. The search list made no mention of this, but only stated that the money was found on the floor beside the cabinet. There was thus no discrepancy so far concerning the sum of

E RM15,000 (see p 420B–C).

(5) A perusal of the judgment of the appellate court showed that the defence had indeed been considered. The degree and extent to which the defence evidence needs to be examined would depend on the particular fatcs and circumstances of each case and the

F issues involved. In this case, once it was proved that the money of RM15,000 had been given to or received by the accused, the presumption under s 14 of the PCA arose (see p 421H–I).

[Bahasa Malaysia summary

G Pemohon pada mulanya dibicarakan atas dua pertuduhan rasuah di bawah ss 3(a)(i) dan 4(a)(i) masing-masing Akta Pencegahan Rasuah 1961 ('APR'), di hadapan mahkamah sesyen. Menurut fakta-fakta, pihak pengadu, seorang bernama Wong Sow Ying ('SP2') dipertuduhkan di mahkamah pemohon di bawah Akta Rumah Judi Terbuka 1953. Pemohon kononnya telah memberitahu seorang

H bernama Ong Leong Chuan, seorang penterjemah mahkamah ('SP4'), bahawa kes boleh diselesaikan jika adanya tawaran sebanyak RM15,000. SP4 memaklumkan perkara ini kepada SP2 yang kemudiannya meminta bantuan daripada majikan anak lelakinya ('SP3') untuk merundingkan bayaran amaun tersebut. Akibat

I kegagalan dalam memuktamadkan perundingan, SP3 melaporkan perkara itu kepada badan pencegah rasuah. SP4, yang kemudiannya ditangkap, bersetuju untuk bekerjasama dengan badan pencegah rasuah. Akhirnya, pemohon ditangkap.

Hakim sesyen melepaskan dan membebaskan pemohon atas kedua-dua pertuduhan tanpa memanggil pembelaan, dengan memutuskan bahawa tiada kes prima facie telah diwujudkan. Atas rayuan oleh pihak pendakwa, Mahkamah Tinggi mengesahkan pembebasan dan pelepasan berhubung dengan pertuduhan pertama tetapi membenarkan rayuan atas pertuduhan kedua dan memerintahkan supaya pemohon memasukkan pembelaan yang berkaitan ('rayuan pertama'). Oleh itu, kes dihantar balik kepada hakim sesyen yang sama yang membebaskan dan melepaskan pemohon atas pertuduhan kedua sekali lagi selepas mendengar pembelaan. Sekali lagi, pihak pendakwa merayu kepada Mahkamah Tinggi terhadap pembebasan dan pelepasan. Hakim rayuan (selain daripada hakim yang mendengar rayuan pertama) membenarkan rayuan oleh pihak pendakwa, mengetepikan pembebasan dan menyabitkan pemohon dan menjatuhkan hukuman pemenjaraan tiga tahun dan denda sebanyak RM5,000 jika ingkar pemenjaraan 12 bulan.

Kes di hadapan mahkamah adalah melalui rujukan di bawah s 66 Akta Mahkamah Kehakiman 1964 ('AMK'). Peguam pemohon berhujah bahawa hakim rayuan tidak sepatutnya bergantung kepada keterangan spesifik oleh kerana beliau telah membuka semula keterangan atas mana pemohon telah dibebaskan. Persoalan untuk penentuan adalah sama ada ianya terbuka kepada sebuah mahkamah rayuan yang lain untuk mengkaji, mengulas dan mengambil kira keterangan yang dikemukakan atas pertuduhan atas mana seorang tertuduh dibebaskan bagi menyokong sabitannya atas pertuduhan kedua yang tinggal.

Atas fakta-fakta dan keterangan kes, peguam tertuduh berhujah, antara lain, bahawa: (i) hakim rayuan salah arah diri dalam mendapati bahawa terdapat sokongan keterangan SP2 apabila keadaan menunjukkan sebaliknya; (ii) hakim rayuan gagal mengenal pasti kepentingan kandungan senarai geledah dalam mana ia dinyatakan bahawa wang dijumpai di lantai di sebelah kabinet di kamar pemohon; dan (iii) hakim rayuan gagal mempertimbangkan keterangan pembelaan sama sekali.

Diputuskan:

(1) Walaupun dalam kes-kes di mana terdapat perbicaraan terdahulu, ia tidak bermakna bahawa rujukan tidak sekali-kali boleh dibuat kepada perbicaraan yang lebih awal. Fakta atau keterangan dalam perbicaraan yang lebih awal boleh diterima dalam perbicaraan seterusnya di mana fakta atau keterangan demikian adalah relevan atau diperlukan untuk membuktikan fakta yang relevan, misalnya dalam mengecam peristiwa atas mana pernyataan atau pengakuan tertentu telah dibuat atau tindak-tanduk telah berlaku.

Oleh itu, mahkamah rayuan kedua boleh mengkaji, mengulas dan mengambil kira keterangan yang dikemukakan atas pertuduhan yang mana seseorang tertuduh telah dibebaskan bagi

menyokong sabitannya pada pertuduhan kedua yang tinggal dengan syarat keterangan atas pertuduhan pertama diterima dengan betul dalam perbicaraan pertuduhan kedua, dan ia boleh diterima jika ia memenuhi undang-undang keterangan berkaitan dengan kerelevanan. Dalam kes ini, adalah betul dan wajar untuk hakim rayuan merujuk kepada keterangan atas mana pemohon telah dibebaskan oleh kerana mereka mempunyai kaitan dengan kesalahan pertuduhan kedua (lihat ms 411E–H dan 412C–D); *Sambasivam v PP, Federation of Malaya* [1950] MLJ 145 diikut.

(2) Persoalan undang-undang yang boleh dirujuk kepada mahkamah di bawah s 66 AMK tidak sepatutnya merupakan persoalan kepentingan diri sahaja kepada pemohon atau pendakwa raya, tetapi adalah persoalan mengenai kepentingan awam dan Mahkamah Tinggi seharusnya melaksanakan budi bicara di bawah s 66 secara waspada dan bahawa rujukan tidak digunakan sebagai suatu cara tidak langsung untuk merayu terhadap perkara yang telah pun diputuskan secara muktamad oleh Mahkamah Tinggi. Dalam keadaan khas kes ini, yang utama adalah bahawa jika terdapat perasaan syak munasabah tentang sabitan yang salah atas kesalahan, peluang seharusnya diberi untuk mempertimbangkannya semula demi kepentingan awam dan, jika wajar, dibetulkan (lihat ms 414G–H dan 415H–I); *Tan Yin Yen v PP* [1973] 2 MLJ 143 diikut.

(3) Untuk membentuk sokongan di sisi undang-undang, ia mestilah: (i) dengan sendirinya boleh diterima; (ii) datang dari sumber yang bebas daripada keterangan yang perlu disokong; dan (iii) dalam keadaan cenderung untuk menunjukkan, menerusi pengesahan butir material, bahawa bukan sahaja kesalahan yang dituduh telah dilakukan, tetapi juga bahawa ia telah dilakukan oleh tertuduh. Dalam kes ini, keterangan SP4 disokong oleh keterangan SP2 dan SP3 (lihat ms 419A–C).

(4) Tiada percanggahan di antara keterangan saksi-saksi dan kandungan senarai geledah yang dikemukakan. Testimoni kumulatif SP4, SP5 dan SP6 menunjukkan bahawa tertuduh mengendalikan wang itu dan menjatuhkan ke atas lantai antara meja dan kabinet besi apabila SP5 dan SP6 meluru ke dalam kamar. Senarai geledah tidak menyebut perkara ini, tetapi hanya menyatakan wang itu dijumpai di atas lantai di sebelah kabinet. Justeru itu, tiada percanggahan setakat ini berhubung dengan jumlah sebanyak RM15,000 (lihat ms 420B–C).

(5) Suatu penelitian penghakiman mahkamah rayuan menunjukkan bahawa pembelaan memang telah dipertimbangkan. Darjah dan takat kepada mana keterangan pembelaan perlu diperiksa akan bergantung kepada fakta-fakta dan keadaan tertentu setiap kes dan isu-isu yang terlibat. Dalam kes ini, sebaik sahaja ia dibuktikan bahawa wang sebanyak RM15,000 telah diberikan kepada atau diterima oleh tertuduh, anggapan di bawah s 14 APR timbul (lihat ms 421H–I).]

Notes

For cases on relevancy, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1437–1441.

For cases on appeal, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 147–148.

For a case on reference to the Supreme Court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2077.

For cases on s 4(a) of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1868– 1887.

Cases referred to

Ah Mee v PP [1967] 1 MLJ 220 (refd)
A Ragunathan v Pendakwa Raya [1982] 1 MLJ 139 (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
DPP v Kilbourne [1973] AC 729 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)
Gurbachan Singh v PP [1966] 2 MLJ 125 (refd)
Jegathesan v PP [1980] 1 MLJ 165 (refd)
Khoo Cheng Huat v PP [1991] 1 MLJ 42 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Loo Chuan Huat v PP [1971] 2 MLJ 167 (refd)
Mohamed Ali & Anor v PP [1965] MLJ 261 (refd)
Muniandy & Anor v PP [1973] 1 MLJ 179 (refd)
Murugiah v PP [1950] MLJ 282 (refd)
Ng Seng Huat & Anor v PP [1966] 1 MLJ 210 (refd)
PP v Chong Boo See [1988] 3 MLJ 292 (refd)
PP v D'Fonseka [1958] MLJ 102 (refd)
PP v Ku Hang Chua [1975] 2 MLJ 99 (refd)
PP v Lawrence Tan Hui Seng (Supreme Court Criminal Reference No 06–8–90) (refd)
PP v Loh Swee Kon & Anor [1951] MLJ 159 (refd)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
R v Baskerville [1916] 2 KB 658 (refd)
R v Binham [1991] Crim LR 774 (refd)
R v Hay (1983) 77 Cr App R 70 (refd)
Sambasivam v PP, Federation of Malaya [1950] MLJ 145 (folld)
Tan Yin Yen v PP [1973] 2 MLJ 143 (folld)
Wong Foh Hin v PP [1964] MLJ 149 (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144 (refd)
Yue Sang Cheong Sdn Bhd v PP [1973] 2 MLJ 77 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 66
Evidence Act 1950 ss 5, 6, 7, 8, 9
Evidence Act 1872 [India]
Evidence Ordinance (Sabah Cap 43) s 8
Prevention of Corruption Act 1961 ss 3(a)(i), 4(a), 14, 18

Reference from: Criminal Appeal No 42–23 & 70 of 1993 (High Court, Kuala Lumpur)

Christopher Fernando (*Sashi Menon* and *Idrus Ibrahim* with him) (*Majid Krishna Menon & Lee*) for the applicant.

Zulkifli bin Bakar (Senior Federal Counsel) (*Ahmad bin Bache*, Deputy Public Prosecutor with him) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): This case came before us by way of a reference under s 66 of the Courts of Judicature Act 1964. The said s 66 was repealed on 24 June 1994. However, leave was granted prior to that. The question permitted to be brought up for determination is:

> Whether it is open to a second appellate court to analyse, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge.

Previous proceedings

At the material time, the applicant was a magistrate serving in the Magistrates' Court at Jalan Duta, Kuala Lumpur. Initially, he was tried on the following two charges before the Sessions Court in Kuala Lumpur:

(a) under s 3(a)(i) of the Prevention of Corruption Act 1961 for *corruptly soliciting* for himself a sum of RM15,000 from one Wong Sow Ying through one Por Choo Aik @ William as an inducement to acquit and discharge the said Wong Sow Ying of an offence in a criminal case ('the charge of soliciting'); and

(b) under s 4(a) of the Prevention of Corruption Act 1961 for *corruptly accepting* for himself a sum of RM15,000 from one Por Choo Aik though one Ong Leong Chuan as an inducement to acquit and discharge one Wong Sow Ying of an offence in a criminal case ('the charge of accepting').

On 8 March 1993, the learned sessions court judge discharged and acquitted the applicant of both charges without calling for the defence, ruling that no prima facie case against the applicant had been made out.

On appeal by the prosecution, the High Court affirmed the acquittal and discharge respecting the first charge under s 3(a)(i) of the Prevention of Corruption Act 1961 but allowed the appeal on the second charge under s 4(a) of the said Act and ordered the applicant to enter upon his defence in respect thereof. The case was thus sent back before the same learned sessions court judge who, after hearing the defence, again acquitted and discharged the applicant of the second charge. Once more, the prosecution appealed to the High Court against the acquittal and discharge. On 25 April 1994, the learned appellate judge (other than the judge hearing the first appeal), after hearing arguments, allowed the appeal by the prosecution, set aside the acquittal, convicted the applicant and sentenced him to three years' imprisonment and a fine of RM5,000 in default 12 months' imprisonment (see [1994] 2 MLJ 436).

The question referred

Now coming back to the question referred and set out above.

The question is of a general nature without alluding to any part of the evidence, allegedly having been 'analyse, comment and taken into account'. However, in the course of his submission, learned counsel for the applicant referred to certain parts of the evidence respecting which he argued that the learned judge should not have relied on. The learned deputy public prosecutor, on the other hand, contended otherwise. We shall refer to these later.

On the general question as posed, ie without reference to any particular evidence, the answer, in our view, may be found in ss 6, 7, 8 and 9 of the Evidence Act 1950. The sections are set out below:

> 6 Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.
>
> 7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction, are relevant.
>
> 8 (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
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> 9 Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

The above sections (as well as s 10 of the 1950 Act) deal with facts and conducts which are specifically connected with facts in issue. These sections have been described as intended 'to enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings' (see Sir James Stephen, *The Indian Evidence Act* at p 55).

The term 'transaction' in s 6 had been defined by Sir James Stephen, the author of the Bill which later became the Indian Evidence Act 1872, as 'a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue'. In each ease, the judge has to decide according to the circumstances, drawing the line between the facts which are so connected

with the fact in issue as to be part of the same transaction and facts which are beyond that limit. No precise limits can be prescribed. In some cases, the transactions lie within narrow limits of time; in other cases, they may be spread over a long period (see 1 *Sarkar on Evidence* (14th Ed, 1993) at p 125). In some cases, two facts occurring at the same time and place may have no connection between them; but in other cases, two facts separated by a vast distance and place may be parts of the same transaction. As stated earlier, it all depends on the circumstances of each case. Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected by such factors as the proximity of time, proximity or unity of place, continuity of action, and community of purpose or design.

In *Phipson on Evidence* (8th Ed) at p 127, it is said that generally all preliminary acts, whether criminal or not, rendering the crime more easy, safe, certain and effective, are receivable as in the nature of preparations.

Of the law of evidence, the cardinal rule relating to relevancy is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible. In *DPP v Kilbourne* [1973] AC 729 at p 756, Lord Simon of Glaisdale spoke of 'relevance' thus:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness', except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (ie logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

In *Wong Foh Hin v PP* [1964] MLJ 149 the appellant was charged with the murder of his daughter. There was evidence that three months before the daughter's death, the appellant had 'interfered' with his daughter and the matter had been disposed of with a warning to the appellant if the incident occurred again, he would be reported to the police. The incident occurred again just before the daughter's death. The Federal Court held that evidence of the appellant's conduct on those previous occasions was admissible under s 8 of the Evidence Ordinance (Sabah Cap 43) which is in pari materia with s 8 of the Evidence Act 1950, to show that he had the motive to murder his daughter, that is, to prevent her from reporting him.

For the present reference, a case in point is *PP v Loh Swee Kon & Anor* [1951] MLJ 159 (CA). In that case, the accused had previously been acquitted of the charge of consorting under reg 5(1) of the Emergency Regulations 1948. Subsequently, he was charged with the offence of carrying a firearm under reg 4 of the same regulations. To substantiate the charge, an attempt was made to call as a witness the person with whom the accused was alleged to have consorted. The learned judge ruled that any evidence which tended to show that the accused had been guilty of the offence of consorting was inadmissible upon the charge of carrying a firearm. As a result, the witness was not called. By way of a reference, the Federation Court of Appeal was called upon to determine the following somewhat differently worded question:

> Whether evidence, otherwise relevant and admissible, which shows or tends to show that an accused person had committed an act constituting an offence or part of an offence in respect of which he has been acquitted at a connected with the offence subsequently charged as to form part of the evidence upon which it is to be proved.

Delivering the judgment of the court, Brown Ag CJ (Singapore) (as he then was), answered the question referred thus (at p 161):

> The law is that evidence which shows or tends to show that an accused person was guilty of an offence of which he had been acquitted is admissible at a subsequent (or the same) trial upon a different charge, provided that (a) the evidence is so connected with the offence charged as to form part of the evidence upon which it is to be proved, and (b) the evidence would not have been sufficient to establish the charge of which the accused was acquitted. To this extent, and with the limitation contained in (b), our answer to the question put to us is that such evidence is not inadmissible.

Also, in a retrial of an accused, evidence of relevant facts in the earlier trial of a different charge may sometimes be referred to. In *Sambasivam v PP, Federation of Malaya* [1950] MLJ 145 (PC), the accused was originally charged with two offences: (1) carrying a firearm; and (2) being in possession of ammunition, both capital offences under the Emergency Regulations 1948. He had been badly wounded in an incident. The same day he was alleged to have made a statement which was a confession to both charges: he denied making the statement. At the trial, the assessors acquitted him of both charges. The learned judge accepted the verdict of acquittal of the ammunition charge. However, he did not agree with the verdict to the firearm charge and ordered a retrial of that charge. At the retrial, the assessors were not told of the acquittal on the ammunition charge and they convicted the accused on the firearm charge. The Privy Council quashed the conviction. In the judgment of the Board delivered by Lord MacDermott (at p 151), the following passage is of interest to the issue in our present case:

> ... the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant to his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him for at the first trial the facts proved in support of the one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

In *R v Hay* (1983) 77 Cr App R 70 (CA), the appellant/accused was alleged to have made a statement to the police admitting two unrelated offences — burglary and arson. He was tried first on the arson charge and was acquitted, having asserted that the admissions were fabricated and having called alibi witnesses. The details of the burglary admission were 'edited out' at the trial. At the trial for burglary, at the defence request, the

whole of the statement under caution was put before the jury as the accused was going to assert that the burglary admission was also fabricated and rely upon the previous acquittal in support of that defence. The trial judge, however, refused to admit the evidence of acquittal. The defence also applied for leave to call the alibi witnesses in the arson case in order to prove that that part of the statement made by the appellant was untrue. The trial judge also refused the application. On appeal, the conviction was quashed. On the request to adduce the alibi evidence, the Court of Appeal, contrary to the ruling of the trial judge, held that the alibi evidence relating to the arson was also admissible in the burglary charge. On the last point, O'Connor LJ said (at p 75):

> When the challenge is made to the truth of a confession statement, if it be that there is independent evidence which if believed demonstrates that a material part of the statement must be untrue, then it seems to us that the defendant is entitled to have that evidence put before the jury ... . The defence was that the whole statement had been fabricated and the alibi evidence to the arson confession *would be relevant* to that issue. The fact that the admission of the alibi evidence might have enlarged the scope of the burglary trial cannot be helped ... . (Emphasis added.)

In *R v Binham* [1991] Crim LR 774 (CA), it was held that the prosecution had rightly been permitted to adduce evidence on a retrial of what had been said on oath by the defendant at the original trial for the purpose of establishing that he had lied.

Thus, in our view, even in cases where there have been a previous trial and a retrial, it does not mean that it is never permissible to refer to the earlier trial. Facts or evidence in the earlier trial may be admitted in the subsequent trial where such facts or evidence are relevant or necessary to establish some relevant fact, eg in identifying the occasion on which some particular statement or admission was made (as per Lord MacDermott in *Sambasivam v PP, Federation of Malaya*) or that some conduct took place.

Therefore, on the question of general nature as raised and in the context of the case presently under reference without pinpointing to any particular piece of evidence, it is our view that the answer is in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in our present context, are principally ss 5, 6, 7, 8 and 9 of the Evidence Act 1950 (ie briefly, if the evidence constitutes facts in issue, or if the evidence constitutes collateral facts which: (i) form part of the same transaction, or (ii) are the immediate occasion, cause, or effect of fact in issue, or (iii) show motive, preparation, or conduct affected by a fact in issue, or (iv) are necessary to be known in order to introduce or explain some relevant fact) unless the exclusionary rules, eg rules relating to hearsay apply.

Specific evidence raised

We shall now deal with the specific evidence which counsel for the applicant, in the course of his submission before us, contended that the learned appellate judge should not have relied on:

(1) the evidence of the accused smiling and nodding his head in the company of PW3 William Por and PW4 Ong in the coffee house of the Grand Pacific Hotel, Kuala Lumpur whilst the latter two were carrying on conversation in the Hokkien dialect. There is evidence that among the matters discussed between PW3 and PW4 was the sum of RM15,000 in settlement of the criminal case.

Pausing here, one may consider a different situation. Supposing the applicant had only been charged with the offence of accepting, would the aforesaid evidence of the applicant smiling and nodding have been relevant? We have no doubt that it would. In the instant case under reference, the evidence, in our view, is clearly relevant to both the first charge of soliciting and the second charge of receiving, and is admissible. The evidence is relevant to the second charge of receiving as being so connected as forming part of the same transaction though occurring at different time and place or as being conduct preparatory to receiving or bearing relation to the offence of receiving or explanatory of the nature of the transaction.

Learned counsel for the applicant cited *Sambasivam v PP* [1950] MLJ 145 (PC) to which we have referred in the earlier part of this judgment. In *Sambasivam*'s case, the conviction on the charge of carrying firearm was set aside because of the failure to inform the assessors of the earlier acquittal of the appellant on the charge of possession of ammunition, thereby rendering uncertainty as to how the assessors would have reacted had they been so informed. In the instant case before us, the learned appellate judge, in making reference to the meeting of PW3, PW4, and the accused, and the conduct of the accused in the coffee house of the Grand Pacific Hotel, was fully aware of the acquittal on the charge of soliciting as is clearly demonstrated when the learned appellate judge said (at p 25 of the appeal record):

> In the final analysis, however, the High Court gave the benefit of doubt and dismissed the appeal against the acquittal on that charge.
>
> So we are left with the appeal on the one (or what was previously the second) charge.

It is significant to note that after making the above quoted observation, the learned appellate judge, in discussing the charge of accepting in his judgment, did not make any reference to the incident at the coffee house of the Grand Pacific Hotel.

(2) Next, learned counsel for the applicant referred to the following two passages which the learned appellate judge described as 'facts as found by the learned sessions court judge' (at pp 441G–442A):

(i) Lanjutan kepada beberapa siri perbincangan mengenai bayaran RM15,000, di antara lain, SP3 telah meminta kepada SP4 supaya bayaran RM15,000 itu dapat dikurangkan. SP4 telah memberitahu SP3 bahawa permintaan ini tidak dapat dipersetujui. Ini, menurut SP3, telah menimbulkan kemarahannya dan telah mendorong beliau membuat pengaduan kepada BPR.

(Translation in English:

Following a series of discussions regarding the payment of RM15,000 amongst others, SP3 asked SP4 for the sum of RM15,000 to be reduced. SP4 informed SP3 that the request was not agreeable. This, according to SP3 angered him and prompted him to report to the BPR.)

(ii) Berikutan dengan ini, pegawai-pegawai BPR telah menyerbu dan menahan SP4 dan telah dibawa balik ke pejabat BPR. Begitu juga dengan SP3. Siasatan telah dijalankan ke atas SP4. Sebagai balasan, SP4 menawarkan untuk bekerjasama dengan BPR dan bersetuju untuk menolong memerangkap tertuduh dengan menyerahkan wang perangkap sebanyak RM15,000 kepadanya.

(Translation in English:

As a result, the BPR officers rushed in, detained SP4 and brought him back to the BPR office. Likewise with SP3. An investigation was carried out on SP4. In exchange, SP4 offered to co-operate with BPR and agreed to assist trapping the accused by delivering the trap money of RM15,000 to him.)

The complaint of the applicant respecting the above two passages was that the learned appellate judge had reopened the evidence on which the applicant had been acquitted.

For the respondent, the learned senior federal counsel submitted that the matters contained in the two passages related to the charge of accepting, and it was right and proper for the learned appellate judge to refer to them.

We agree with the learned senior federal counsel. The matters contained in the two passages took place after the meeting at the Grand Pacific Hotel. In our view, they are so connected with the offence of accepting as charged as to form part of the evidence upon which it is to be proved and may be properly considered: whereas the matters in passage (i) explain why PW3 reported the matter to the Anti-Corruption Agency, those in passage (ii) disclose how PW4 turned a prosecution witness. Indeed, without such evidential facts, the case of the prosecution would have been rendered a great deal less intelligible. We would also add that the matters in the two passages aforesaid, in themselves, would not have been sufficient to establish the charge of soliciting of which the applicant had been acquitted.

Learned counsel for the applicant cited *Khoo Cheng Huat v PP* [1991] 1 MLJ 42 where the appellant charged in the sessions court with two offences of (1) soliciting and (2) accepting gratification was acquitted and discharged of the charge of soliciting but convicted of accepting, and, on appeal to the High Court, was acquitted of the accepting charge. The facts and circumstances in that case were different. There, the events occurred on the same date, at the same time and place. The principal witnesses were the complainant and his wife, and their evidence (so the High Court held) must have been rejected because of the acquittal of the soliciting charge by the court of the first instance. Edgar Joseph Jr J (as he then was), hearing the appeal, said (at p 45):

> In such a situation, bearing in mind that the alleged act of soliciting and that of accepting were so intermingled as to make it impossible to separate them, and they depended for their proof upon the same witnesses, that testimony should in all fairness, have been rejected in its entirety.

In the instant case under reference, the events relating to the two charges occurred at different places and on different dates and times. More importantly, the money recovered in the applicant's chambers shortly after the handing over was the same money entrusted to PW4 minutes before PW4 entered the applicant's chambers.

Learned counsel for the applicant also relied on *Murugiah v PP* [1950] MLJ 282. We need only say that that case had been overruled in so far as it purported to be authority for excluding any evidence which tended to show that the accused was guilty upon a charge of which he had been acquitted in considering his guilt upon another charge. See *PP v Loh Swee Kon & Anor* [1951] MLJ 159 (CA).

Review of evidence on a reference

It must be borne in mind at the outset that leave had already been previously granted for the question in this reference to be referred, and we are here to deal with the question.

In the course of arguing the question referred, the point was raised as to the extent to which evidence adduced at the trial could be reviewed. For the applicant, learned counsel argued that once a question for reference was allowed, the reference was a re-hearing and an applicant was entitled to deal with the entire evidence. The learned senior federal counsel, on the other hand, contended otherwise. He submitted that review of the entire evidence could be allowed only in exceptional circumstances within which the present case under reference did not fall.

The care required to be exercised in guarding against references being turned into an appeal may be seen in the observation of Suffian Ag CJ (as he then was) in *Tan Yin Yen v PP* [1973] 2 MLJ 143 (FC) where, in delivering the oral judgment of the court, he said

> It is to be observed that questions of law which may be referred to us under s 66 should not be questions that are of personal interest only to the accused or to the Public Prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under s 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

Perhaps the above observation may more appropriately be regarded to serve as a caution in considering whether to grant leave for questions to be referred.

But where reference of questions had been allowed, authorities tend to lean in favour of embarking upon a review of the evidence should justice so require. In the majority decision of *Yue Sang Cheong Sdn Bhd v PP* [1973] 2 MLJ 77 (FC), Ong CJ said (at p 78):

> My perusal of the evidence on record, however, has left my mind in grave doubt about the guilt of the applicant. Notwithstanding the answers to the questions of law posed in this reference, it is nevertheless the paramount duty of this court to see that, in the last resort, justice is done and any miscarriage of justice rectified.

And later he continued (at p 79):

> At the hearing of this reference, we asked counsel for further argument on the question whether this court had any jurisdiction or power to go beyond answering the questions of law, if we are satisfied on perusal of the evidence on record that the conviction was wrong. On the one hand it was said that the Federal Court has no powers of review; if this is the correct view, then naturally, if the answers do not require that the judgment of the court below be disturbed, this court cannot do anything more than answer the questions raised.
>
> For my own part, however, I feel that it is not only the right, but also the duty of this court to see that justice is done and seen to be done in all cases brought before us in accordance with established rules of procedure. As Viscount Radcliffe said in *Ibralebbe v R* ([1964] 1 All ER 251 at 257): 'Justice is *owed*; it is not granted by favour or accorded at discretion'. If, in the instant case, the conviction was wrong, by reason of its being against the weight of evidence, it surely cannot be right for this court to wear blinkers and treat the questions of law raised as being purely of academic interest and thus allow the conviction to stand.

In *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144, the Federal Court consisting of five distinguished judges turned the reference into an appeal and proceeded accordingly. In the subsequent case of *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 at p 142 (FC), Raja Azlan Shah Ag LP (as His Royal Highness then was), in delivering the judgment of the Federal Court, had occasion to consider and describe *Yap Ee Kong*'s case and *PP v D'Fonseka* [1958] MLJ 102 (CA) as cases involving 'misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views'.

In *PP v Lawrence Tan Hui Seng* (Supreme Court Criminal Reference No 06–8–90), the Supreme Court following *Yue Sang Cheong Sdn Bhd v PP*, reviewed the entire evidence besides answering the questions raised in the reference.

It was on the above authorities and having regard to the initial submissions of counsel for both sides that we acceded to the request of En Christopher Fernando of counsel for the applicant to review the evidence with equal opportunity afforded to the learned senior federal counsel to respond thereto. In the particular circumstances of the instant case, predominant in our mind was that if there was reasonable suspicion of a wrong conviction of the offence, opportunity ought, in the public interest, be given to have it reconsidered and, if appropriate, be corrected.

The evidence and the facts

Before proceeding further, it would be useful to set out, briefly, the pertinent evidence adduced and the facts arrived at in relation to the charge of accepting.

The complainant, PW2 Wong Sow Ying, was charged in the applicant's court with an offence under s 4A(a) of the Common Gaming House Act 1953. PW4, Ong Leong Chuan, an interpreter of the court, testified that in September 1992 the applicant (hereinafter referred to as 'the accused') told him that the case could be discharged (dibebaskan) if there was an offer of RM15,000. On 22 October 1992, PW4 approached PW2 and told the latter that she could be freed on payment of RM15,000. PW2 then enlisted the assistance of PW3 William Por Choo Aik (the employer of PW2's son) to negotiate the payment of the said amount. Subsequently, PW3 met PW4 whom he previously knew. Through their arrangement, a lunch was held in the coffee house of the Grand Pacific Hotel. There is evidence from PW3 and PW4 that at the lunch, they negotiated in the Hokkien dialect regarding the payment of RM15,000 for the accused and that during the negotiation, the accused, who was present, smiled and nodded his head when his name was mentioned.

There is evidence from PW3 that as a result of PW2 seeking his financial assistance towards payment of the said sum of RM15,000, PW3 attempted to get a reduction of the amount but failed. This prompted PW3 to report the matter to PW5 Woon Kok Haw of the Anti-Corruption Agency.

On 27 November 1992, PW4 was arrested by the Anti-Corruption Agency in front of the Sakura Restaurant during a meeting between PW2, PW3 and PW4 when PW3 was to hand over the sum of RM15,000 to PW4. This sum of RM15,000 in currency notes were previously given to PW3 by the Anti-Corruption Agency and marked. There is evidence that after PW4's arrest, PW4 agreed, at the insistance of PW5, to co-operate with the Anti-Corruption Agency in bringing the accused to book.

On 28 November 1992, PW3 and PW4 went together to the court with the same marked currency notes of RM15,000 intending to see the accused. However, PW4 subsequently told PW3 that the accused would only see PW4. Hence PW3 handed over the marked currency notes to PW4 in the toilet. Thereafter, PW4 went to see the accused in the latter's chambers where he handed over the currency notes to the accused. PW4 then went out of the accused's chambers when a process server Rajendran entered; and, as directed by the officers of the Anti-Corruption Agency, he (PW4) gave a pre-arranged signal indicating to PW5 who was outside that the money had been handed over to the accused. Thereafter, PW4 re-entered the accused's chambers. According to PW4, the accused then locked the chambers and counted the money. Upon hearing sounds attempting to open the door of the chambers, PW4 opened the door whereupon PW5 and PW6 (both Anti-Corruption Agency officers) entered the chambers and the accused was seen letting off the money which dropped onto the floor.

In his defence, the accused denied giving any indication to PW4 that PW2's case could be settled for RM15,000 and accepting the sum. He, however, admitted that there was the lunch at the Grand Pacific Hotel which, he said, was organized by PW4 in conjunction with the accused's

impending transfer to the Legal Aid Bureau, Penang. The accused admitted that he smiled when his name was mentioned during the conversation between PW3 and PW4 but only to show that he was following their conversation as he could neither speak nor understand Hokkien. As for the money RM15,000 found on the floor of his chambers, he said he did not know how it came to be there and he came to know of its existence only upon its discovery by the Anti-Corruption Agency officers.

DW2 Aslam bin Zainuddin, a fellow magistrate, testified that after PW4 had given evidence in this case, PW4 told him that he (PW4) had to put the money in the accused's chambers because he was worried about his family and what would happen to them, and, according to DW2, PW4 appeared remorseful when he said this.

After perusing the case, the learned appellate judge found the evidence against the accused overwhelming and that the defence evidence was insufficient to rebut the elements of the charge. On the entire evidence, he held the view (at p 446) that the trial sessions court 'cannot fly in the face of the facts'. He ruled out the probability of the money being planted to frame the accused. He found that the accused had failed to rebut or satisfactorily explain that the money handed to him was not corrupt money. The learned appellate judge then set aside the order of acquittal and discharge, found the accused guilty, convicted and sentenced him accordingly.

Contentions for the accused

We shall now deal with the defence contentions but in slightly different order from that in which they were presented to us. Before us, learned counsel for the accused contended that the learned appellate judge:

(1) was wrong in holding that PW4 Ong was not an accomplice; and:

(2) had misdirected himself by finding that there was corroboration when there was none.

We decline to entertain contention (1) above, but would, for the purpose of this case, treat PW4 Ong as an accomplice. We decline for two reasons: firstly, on 4 May 1994, this court composed of a different panel had, under an application pursuant to the then s 66 of the Courts of Judicature Act 1964, given leave to refer the question now under consideration, but had not granted leave to refer the following question, ie:

> Whether the character of a self-confessed accomplice assumes the character of an ordinary independent witness merely because the Investigating Agency intervenes by arresting him and insists that he completes the acts he had earlier undertaken to do as an accomplice.

Appropriateness of the phrasing of the question in the light of the facts and circumstances of the case apart, to deal with the contention canvassed now would, in effect, be entertaining what had been disallowed to be referred by this court earlier. This we would not do; secondly, we did not have the benefit of hearing on the issue since counsel for both sides did not advance

any argument on the point. In our view, the interest of justice is served if we, as indicated earlier, treat PW4 Ong an accomplice.

This brings us to contention (2) of the accused, ie that there was no corroboration.

In the celebrated case of *R v Baskerville* [1916] 2 KB 658, Lord Reading CJ expressed the requirements of corroborative evidence thus (at p 667):

> ... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. ... . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

R v Baskerville has been persistently followed by our courts in numerous cases, eg by the Federal Court in *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144; *Muniandy & Anor v PP* [1973] 1 MLJ 179; *Loo Chuan Huat v PP* [1971] 2 MLJ 167; *Ah Mee v PP* [1967] 1 MLJ 220; *Ng Seng Huat & Anor v PP* [1966] 1 MLJ 210; by the High Court in *PP v Sarjeet Singh & Anor* [1994] 2 MLJ 290; *PP v Chong Boo See* [1988] 3 MLJ 292; *Jegathesan v PP* [1980] 1 MLJ 165; *PP v Ku Hang Chua* [1975] 2 MLJ 99; *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153; *Gurbachan Singh v PP* [1966] 2 MLJ 125 and *Mohamed Ali & Anor v PP* [1965] MLJ 261, to cite some.

In *DPP v Kilbourne* [1973] AC 729, Lord Hailsham said (at p 741):

> In my opinion, evidence which is: (a) admissible; and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration.

And, in the same case, Lord Reid said (at p 750):

> We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements, we should not accept them as corroborative.

The corroborating evidence must confirm the evidence requiring corroboration in at least one particular which is directly relevant to the issues in the case in that it tends to suggest not only that the offence charged has been committed but also that it has been committed by the accused. Such corroborating evidence may be direct or circumstantial.

A Thus, to be capable in law of constituting corroboration, the evidence must:

(i) in itself be admissible

(ii) come from a source independent of the evidence requiring to be corroborated; and

B (iii) be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

In the instant case, PW4's indication of settling the gaming case against C PW2 was amply corroborated by the evidence of PW2 and PW3. There is also the evidence of PW3 that he delivered the marked currency notes of RM15,000 to PW4 in the toilet at the court precincts in the morning of 28 November 1992. As regards the events in the accused's chambers on that same fateful morning, PW4's evidence of handing over the RM15,000 (marked) to the accused, his giving the pre-arranged signal upon re- D emerging from the chambers, his re-entering the chambers whereupon the door was locked and the accused started counting the money, and his seeing the accused releasing the money when PW5 and PW6 rushed in upon the door being opened after attempt was made to open it, were materially corroborated by the evidence of PW5 and PW6. PW5 testified E that when he rushed into the accused's chambers followed by PW6, he saw the accused holding the money in his hand and that upon seeing him, the accused dropped the money and attempted to step on it. PW5 said that at that material time, the accused was standing between a steel cabinet and a table. PW6's evidence corresponded with that of PW5 in material particulars. He said that upon entering the accused's chambers, he saw the F accused standing near a steel cabinet and that when the accused saw him, the accused let go of something which was in his hand. In this connection, it is pertinent to note that the search list (exh P8) stated that the RM15,000 was found on the floor beside the steel cabinet. PW6 said that what fell down on the floor was RM1,000 and RM500 notes folded into two. Both G PW5 and PW6 testified that the accused was shocked when he saw them entering his chambers.

We find the contention of lack of corroborative evidence unsustainable.

Another contention before us on behalf of the accused was that the learned appellate judge failed to recognize the significance of the contents H of the search list exh P8. As mentioned earlier, the search list stated that the RM15,000 was found on the floor beside the cabinet in the accused's chambers. Before the learned appellate judge, it was argued that the money was found only after a search. The learned appellate judge disagreed with the sessions court judge's interpretation that the word 'found' ('dijumpai') carried the connotation that before the money was found, a I search was made or the money was already in the place where it was found. The learned appellate judge said in his judgment (at p 444F): 'If every court case has to fall into the abyss of semantics, then the court is another linguistics department.'

Encik Christopher Fernando further contended before us that the search list was not given due consideration and weight in that it did not say that the money was thrown to the ground. *Gooi Loo Seng v PP* [1993] 2 MLJ 137 was cited in support of the proposition that when the matter stated in a search list differed from what a witness stated, the discrepancy was fatal to the prosecution case. We see no merit in the contention. In the case before us, there is no discrepancy between the evidence of the witnesses and the content of the search list exh P8. As stated earlier, the cumulative testimonies of PW4, PW5 and PW6 show that the accused was handling the money and dropped it to the floor between the table and the steel cabinet when he saw PW5 and PW6 rush into his chambers. The search list made no mention of this but only stated that the money was found on the floor beside the cabinet. There is thus no discrepancy so far as concerning the sum RM15,000. It is not obligatory to state in the search list how the RM15,000 came to be landed on the floor. This can be supplied by the testimonies of witnesses.

Gooi Loo Seng v PP (a drug trafficking case) is clearly distinguishable. In that case, there was a glaring discrepancy between the search list and Inspector Nordin's evidence as to who recovered the heroin. This was highly material as it affected the propriety of the inference on the custody and control of the heroin and knowledge of its nature.

It was also contended that the learned appellate judge failed to consider the significance of the fact that PW4 refused to take a tape-recorder into the accused's chambers when delivering the money in the morning of 28 November 1992. On examination of PW4's evidence on the point, we think it more correct to say that he disagreed to bring the tape-recorder. When pressed under cross-examination, he said he did not know why he disagreed. Thus, on the evidence, there is no explanation for PW4's disagreeing to bring along the tape-recorder. Before us, learned counsel for the accused did not at all submit how PW4's disagreement to do so had adversely affected the defence case. We see no merit in the contention.

Learned counsel for the accused further submitted that the learned appellate judge was wrong in saying that discrepancies and contradictions were the same thing. We must point out, with respect, that nowhere in his judgment did the learned appellate judge said this. The relevant part of the judgment under the heading '*Discrepancies, Contradictions: How vital?*' is from pp 30–36 of the appeal record (at pp 443E–445E). It contained four sub-headings, ie:

(a) Pager;

(b) Evidence of bad character;

(c) Is Ong SP4 the star witness; and

(d) a rejection of the trial sessions court judge's interpretation of certain wording in the search list exh P8 with which we have already dealt earlier on.

We find no discrepancy or contradiction within each of the subheads (b) (c) and (d). As regards subheading (a), the contradiction appears in the

A evidence of PW3 and PW4. Whereas PW3 said he did not buy a pager for PW4, PW4 said that PW3 gave him a pager in order to facilitate communication between them, and that this took place several months before the accused was arrested. From this contradiction, the trial sessions court judge remarked that there was something not right about the B relationship between PW3 and PW4. Concerning this remark, the learned appellate judge observed its vagueness:

> Unfortunately, the impact of the relationship was not explained, ie whether the evidence became untruths or which parts cannot be believed as a result of such relationship.

C Reading the judgment of the learned appellate judge under the subheading, it is obvious that he considered it minor (and with which we respectfully agree) the discrepancy in the evidence of PW3 and PW4 relating to the supply of pager, and did not have any bearing on the case having regard to the charge and the circumstances as shown by the evidence. The charge, D it must be remembered, is one of corruptly accepting money. There is the evidence of negotiation on the payment of RM15,000 between PW3 and PW4. The crucial part of the case is what took place in the accused's chambers. In this regard, there is evidence from PW4 handing over the marked money to the accused who was seen counting it, followed by the evidence of PW5 and PW6 seeing the accused holding and dropping the E money on to the floor. Against the evidential scenario as outlined above, we see no materiality in the supply or otherwise of pager. Nor, in our view, could any improper relationship between PW5 and PW6 be reasonably inferred on the conflicting and scanty evidence mentioned above. We see no merit in the contention.

F Before leaving the issue, it is not impertinent to echo the following observation of Thomson CJ in *Khoon Chye Hin v PP* [1961] MLJ 105 at p 107 in dealing with discrepancies and contradictions of witnesses:

> If a witness demonstrably tells lies on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his G evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points, then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

Finally, it was contended that the learned appellate judge failed to consider H the defence evidence at all. With respect, we are unable to agree. A perusal of the judgment of the appellate court shows that the defence had indeed been considered. The degree or extent to which defence evidence needs to be examined would depend on the particular facts and circumstances of each case and the issues involved. In the instant case, once it was proved that the money RM15,000 had been given to or received by the accused, I the presumption under s 14 of the Prevention of Corruption Act 1961 arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a

balance of probabilities, the test applied in civil proceedings: *PP v Yuvaraj* [1969] 2 MLJ 89 (PC). A

The story of the accused is simple. He denied committing the offence. He denied having spoken to PW4 about PW2's case. He came to know of the money being on the floor in his chambers when PW4 pointed to the money in response to PW5's question: 'Where's the money?' He denied holding the money when PW4 entered his chambers the second time and when PW5 entered it. The accused did not expressly allege PW4 leaving the money in the chambers, but reading his evidence together with that of DW2, it appears obvious that the intention of the accused's defence, which is short and simple, was to create the impression that PW4 Ong planted the money in the accused's chambers without the knowledge of the accused, for DW2 said that PW4 had told him that he (PW4) had to put the money in the accused's chambers as he (PW4) was worried about his family. The explanation, however, has to be considered in the light of PW4 turning a prosecution witness after his arrest by the Anti-Corruption Agency. B C D

Under the law of our land, there is no presumption of PW4, even assuming he was an accomplice, being unworthy of credit by the mere reason of his delivering the money to the accused (see s 18 of the Prevention of Corruption Act 1961). Furthermore, on the accused's own evidence, he and PW4 had a cordial relationship while maintaining their respective positions. There is not even a suggestion, let alone evidence, that PW4 had maliciously wanted to harm the accused. On this last point, the learned appellate judge, in our opinion, had properly addressed his mind when he said in his judgment (at p 40 of the appeal record) (also at p 446I): E

> I have warned myself that corrupt money can easily be planted or that an innocent man can be quickly framed but from all the evidence gathered by the sessions court judge this cannot be so in our case. F

As to the consideration of the defence, the learned appellate judge said (at pp 38–40 of the appeal record) (also at p 446C–H):

> The evidence of the accused [the respondent here] and DW2 is, in my opinion, insufficient to rebut the element of the charge ... . On all the evidence that the sessions court had, I am of the opinion the court cannot fly in the face of the facts. ... G
>
> Then once there was a finding that corrupt money was passed (or in this case handed) to the respondent, it was up to the respondent to rebut that the money was not corrupt money or show it was innocently given ... This was not satisfactorily explained. H

Having regard to the above, we find totally unacceptable the contention that the learned appellate judge had failed to consider the defence evidence at all. True, he had not related the evidence of the accused and that of DW2, but that is quite different from saying that the defence case was not at all considered. From the tenor of the judgment, we are convinced that he had. I

Conclusion

On our part, we find the prosecution evidence weighty and convincing. This coupled with the absence of any reasonable explanation why PW4 and, for that matter, any of the other prosecution witnesses, should frame the accused, we are in agreement with the learned appellate judge that, on the facts and the law applicable, the accused had failed to raise any reasonable doubt on the prosecution case.

We are fully aware of the established general principle that an appellate court should be slow to substitute its own view of the facts for that of the trial judge. However, after perusing the appeal record in this case, we are of the unanimous view that the learned appellate judge had more than sufficient grounds and was right in reversing the order of acquittal and discharge of the accused and substituting therefor the order of conviction. Accordingly, we affirm the order of conviction.

On sentence, we are of the unanimous view that the imposition of the fine of RM5,000 in default 12 months' imprisonment in addition to the prison sentence of three years is wrong in principle since there is clear evidence that the accused had not profited from his wrong doing; the three-year imprisonment sentence is already sufficient punishment. In our view, a punitive fine should not be added to a term of imprisonment which a sentencer considers is itself adequate punishment for the offence except in rare cases where, for example, even the maximum permitted custodial sentence is considered to be inadequate. We, therefore, set aside the fine of RM5,000 in default 12 months' imprisonment but confirm the sentence of three years' imprisonment.

Order accordingly.

Reported by Kenneth Goh